

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6109

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ANTHONY B. CATALDO and
ADA W. CATALDO,

Appellants,

-against-

77-6109

DAVID P. LAND, T. GORMAN REILLY
and ROBERT LEVINE,

Respondents.

APPELLANTS' BRIEF

Appeal from Order of United States District
Court, Eastern District of New York,
Dismissing Action

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APPELLANT'S BRIEF

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QUESTIONS INVOLVED

1. In this action against government officials personally, for causing damages to plaintiff, by perpetrating a fraud upon the court, and obstructing justice, by causing the dismissal of a suit to recover a refund of tax payments, against the facts and applicable law, was the Honorable Court below correct in holding that the judgment of dismissal in the refund suit ^{was} res judicata of this action? Aren't the issues in the tax refund suit dissimilar to the issues in this fraud suit?

2. Was the Honorable Court below correct in applying collateral estoppel to this cause of action for fraud, and for obstruction of justice, because of the decisions in the tax refund suit on collateral matters without a showing that

such decisions were made on the merits, were final, and were necessary to the final decision within the tax refund suit?

3. Didn't the Honorable Court below err in not advertng to plaintiff's claim under State law, of being entitled to the relief sued for by reason of Section 487 of the Judiciary Law? If Section 487 applied, shouldn't the Court have granted plaintiffs summary judgment on this ^{cause of} action?

4. Didn't the Honorable Court below err in not granting plaintiff's motion to strike the appearance of the United States Attorney for these defendants, because perjury and obstruction of justice are criminal acts, and thus outside the scope of the officials' duties?

FACTS AND PROCEEDINGS

The Court below, in granting summary judgment dismissing this suit, recited only the following facts:

"An Internal Revenue Service (IRS) audit of the Cataldos' 1963 joint tax return resulted in a \$2,210.87 deficiency assessment which along with \$507.62 in interest, plaintiffs subsequently paid under protest. After a claim for the full amount was rejected by the IRS, plaintiffs commenced a refund action in the United States District Court for the Southern District of New York. Defendants David P. Land and T. Gorman Reilly, both assistant United States attorneys, were jointly responsible for the government's defense. The case proceeded to trial in May 1973, and lasted for three days. In an opinion filed on June 29, 1973, the court granted judgment in favor of the government and dismissed plaintiffs' claim with prejudice.

That judgment was affirmed by the Court of Appeals in a per curiam decision on June 25, 1974. Cataldo v. United States, 501 F.(2) 396, (2d Cir. 1974).

In November 1974, plaintiffs commenced the instant action. The complaint charges Land, Reilly, and Robert E. Levine, the IRS agent in charge of the Cataldo tax audit, with conspiring to defraud the court during the trial of the tax refund suit. In brief, plaintiffs allege that Levine wrongfully disregarded a subpoena duces tecum and testified perjurally in the refund trial while defendants Land and Reilly suborned such perjury, advised Levine to ignore the subpoena, and consistently misrepresented the applicable law and operative facts to the court." (p. 82 (pp. 82-84)*)

While this is a recitation in general scope of some of the actions of the defendants alleged in the complaint, there were additional specific acts alleged of how these defendants had asserted their unlawful claims to false facts and invalid law. Also, the papers of the plaintiffs on the motion (pp. 52-81) showed the method by which Judge Levet was imposed upon to accept defendant's invalid claims to law and of false facts by the intervention of the Judge's secretary, Mr. Madden. Mr. Madden is alleged to have been in collusion with Land and Reilly, for it was he who presented such unlawful claims to invalid law and false facts to Judge Levet, representing them as valid and controlling the Court's decision.

*Citations are to pages of Appellant's Appendix, unless otherwise identified.

The trial was so organized by Mr. Madden for Judge Levet as to have caused Judge Levet to direct plaintiffs' counsel to put in his proof by following a list of items of expense contained in defendants' memorandum, without allowing plaintiff-counsel to follow his own order of proof (56-59). The order of proof insisted upon by Judge Levet was to follow a list of expenses which contained many items which had already been allowed by the government, either at the auditing level or admitted during the litigation in answer to interrogatories, or upon the deposition of Levine (56-59). Plaintiff had prepared a list of expenses already admitted as allowable. It was marked "EX. 24" for identification (79, 57). It was submitted to the Court in advance of the trial (56, 57). Its offer into evidence was refused (66). Yet, the list of the defendant was submitted after the trial had commenced (57, 58). Plaintiff had no prior notice of the contents of defendants' trial memorandum. Plaintiff-counsel had organized his proof (56, 57) by showing first, through Mr. Levine's deposition, that there were items of substantial sums in the assessment that had no relation to the facts. Thus, the assessment would be shown to be arbitrary. The presumption of its correctness would be destroyed. Defendant would have the burden of proof, but its claims to non-deductibility would have no support in the facts. Instead, without pleading or any other notice, and

without even having an opportunity to read the list of alleged disputed items contained in defendant's memorandum, plaintiff counsel was directed by the court to abandon his own order of proof and to proceed with proof of the deductibility of the items in defendant's memorandum (56-59). The defendant had not pleaded such an issue (57). On the other hand, Mr. Madden failed to place plaintiff's list of items in dispute, which lists were marked "EXHIBITS 24 and 25" for identification, before the Court (57). Yet, Mr. Madden had been handed these two lists personally, but he did place the memorandum of the defendant before the Court with the statement that the issues to be tried was limited to those items (56, 57, 58).

Furthermore, the Court would now allow any evidence by plaintiffs to show how his business was generally conducted (58), in which context the business-character of the claimed expense would appear to make them necessary expenses. Thus limited to proving obvious items, such as payment for court stenographer's fees, bond fees, etc., there was a wholesale disallowance of all but a few items of the list in defendant's memorandum. The order of proof decided by Judge Levet would require plaintiffs to assume the burden of proof as though the listed deductions objected upon the trial and contained in defendants' memorandum were included in the assessment, which was not the case. Isn't it the

assessment which sets the issues in a tax refund suit, and if the correctness of the assessment is assailed, isn't the presumption in favor of its correctness lost to the Government? This point of order of proof was lost by reason of the way Mr. Madden presented the issues to be tried to Judge Levet.

There were other areas of facts in which arbitrary claims were made by defendants, and which, with Mr. Madden acting as devil's advocate, were unwittingly accepted by Judge Levet. One such area was the treatment of the lawyer's diary in which was detailed the cash expenditures for such things as the purchase of stationery and office supplies, which were purchased C.O.D., court fees, expenses of daily travelling to and from courts and other offices, public telephones, lunches with clients paid for in cash, and other items related to the business, such as tips, cable charges, postage, and the usual out-of-pocket expenses incurred from day to day in the operation of the office. On audit, the auditor disallowed those items, which were over \$25. in amount, refusing to accept the diary notations as proof (60, 74, 75). He said that he wanted proof outside the diary. He did allow an aggregate of some \$2200. of those items that were below \$25 each, saying that no separate writing was required for those (74, 75). In the memorandum, the defendants claimed that even the \$2200. was to be disallowed (61). This came about by reason of the fact that in 1972 the

plaintiff-counsel had removed his office from John Street to his present address, but the diary was discovered missing some months after the move (62). The plaintiff had a record of the amounts stated in the diary that he had made when preparing the return (65). He sought to offer this secondary evidence but it was refused. He was not even allowed to lay the groundwork for that evidence by showing that he had kept the diary, but that it was found to be missing after the removal of his office. These defendants kept insisting that such an explanation was not proof (66). Not even a tape of the disallowed items made by an IRS auditor from the diary itself was allowed into evidence. Plainly, these defendants were using the loss of the diary as a reason for their change of position to claim more items than the assessment had. On the other hand, despite the fact that defendant Levine had stated on the pre-trial deposition that he had had the diary, and had taken tapes from it (65); on the trial, he stated that he had not had a diary on the audit (67, 68, 73-78), but only yellow sheets of paper where bare figures with no notations of what they were was what he had seen (65). To show that this turn-around in Levine's testimony was induced by his co-defendants, plaintiff-counsel stated, in the affidavit on this motion, that he had seen the three, huddling during recess a few feet away, talking about EX. 29 for identification, which was the listing of figures taken from the diary at the preparation of the return (67, 68, 75-78).

There were also the false claims made of the kind of written corroboration that was needed for entertainment expense, for interest, for contributions, all of which had passed muster with three auditors before the suit was stated, but Land and Reilly disregarded those admissions of deductibility and without pleading the disallowance of new items of expenses, added such items to the list in the defendant's memorandum (79, 80, 81).

The question of contempt would have ended without the judge pressing the charge, but for Mr. Madden's prompting (59). The order then made was based upon proceedings that never took place (59).

Did Judge Levetlie, in making such order? Not that he did so knowingly, but Mr. Madden did know that the proceedings stated in the order did not occur.

While this fact digest is of the proceedings at the trial of the refund suit, it is not being used to review that case. These recitations are necessary to show the fraud and collusion practiced upon Judge Levet, to show that this cause of action is supported by facts. The defendant's claim, that plaintiffs are seeking to review this loss of the tax refund suit, is not true, and the Court below was in error when it failed to distinguish this cause of action from the cause of action for a refund.

The affidavit of Anthony B. Cataldo, and the plaintiff's counter-statement, pursuant to rule 9(g), are reproduced at pp. 52-81 of appellants' appendix. These allegations show the extent of Mr. Madden's interference. It is respectfully submitted that this Court should examine these pages, 52-81, if it is to do justice to this case. None of these facts have been denied by defendants. They lead to the conclusion that Mr. Madden's interference was of the extrinsic kind of fraud upon the court. It is respectfully submitted that the Court below erred in calling such conduct "intrinsic" fraud. It erred, too, in not acknowledging that such conduct violated due process.

When
/ plaintiffs' appeal failed to correct these violations of due process, they brought this action to recover their damages from the active participants for their criminal actions.

The Court below went on to hold that both res judicata and collateral estoppel, operated by the decision in the refund suit, which warranted the dismissal of this suit (87, 88). But, plaintiff will attempt to show that those doctrines are not applicable in this case.

The proceedings in this case before the motion and cross-motion for summary judgment were that this action was commenced in the Supreme Court, Queens County (2-5), seeking damages under two causes of action (6-13). The first is directed

to defendant Land and Reilly, as lawyers, and was intended to charge them with obstruction of justice (6-9), as defined in Section 487 of the Judiciary Law (70). The second is a charge of conspiracy to defraud and to obstruct justice against all three defendants (9-13). Although Levine is not a lawyer, he is a government agent. The perjury was committed by him, in testifying on the trial exactly the opposit^eion to his testimony on the examination before trial in respect of the arbitrary deductions made by the Appellate Division, and in respect to the diary (58-62, 65-67, 73-78). On the deposition, he testified that two items, one for \$1084.57, and the other for \$2282.58, were disallowed by the Appellate Division, without there being any claims to deductions in the tax return for them. On the trial he testified that the assessment was properly made.

Plaintiffs, it is respectfully submitted, were entitled to partial summary judgment as against Land and Reilly for neither denied committing the action recited above. They seemed to have sought refuge in stating that what they did was done within the scope of their duties in good faith. Such is no defense to the violation of Section 487 of the Judiciary Law.

Furthermore, defendants are mistaken in assessing their duties as including criminal conduct. A United States Attorney is appointed to uphold the law, not break it.

In breaking the law, Land and REilly's actions were personal actions. Accordingly, even the appearance of the United States Attorney for them in this action is outside the scope of the latter's office, as he, too, should uphold the law, not defend against its violation. Nor was the power of the person in the Attorney General's Office, authorizing the appearance of the United States Attorney for these defendants proven. In fact, there was an absence of proof of such power.

The Court denied plaintiffs' motion to strike the appearance of the U.S. Attorney, by its order of July 1, 1976, again overlooking the evidence of perjury and fraud upon the Court that had been committed. The Court said that it felt bound to grant defendants the protection of the United States until a court would find that the criminal action was committed. Such a rule is unfair where there has been a prima facie showing of criminal conduct, and where there has not been any denial of such conduct, but only a claim that it was done in the line of duty. This claim is an incongruity in itself.

POINT I

WAS RES JUDICATA PROPERLY APPLIED?

Before discussing what the Honorable Court below did in applying res judicata, it is necessary to settle

whether state law applies to this case, because this is a removed case. In Cowley v. Northern Pacific R.R. Co., 159 U.S. 569, the Supreme Court said, at p. 582:

"Had the case never been removed to the Circuit Court, it would have proceeded in the State Court * * * we are of the opinion that, upon its removal to the Circuit Court, the petitioner lost no right to which he would have been entitled, had the case not been removed."

Also, at p. 582, the Court said:

" * * * the case * * * remains in substance a proceeding under the Statute, with the original rights of the parties unchanged."

This last referred to the fact that a state statute gave the petitioner the right to proceed as he had done in the state court. At p. 583, the Court concluded:

"The case having been removed * * * upon the petition of the defendant it does not lie in its mouth to claim that such Court has no jurisdiction * * *"

It is established law that a plaintiff is the absolute master of what jurisdiction he will choose. Jurisdiction depends upon the case made and the relief demanded by the plaintiff. See Koratron Company v. Deering Millikin, Inc., 418 F.(2) 1314 at p. 1317, and cases cited. In Warner Bros. v. R.A. Ridges Distrib. Co., 475 F.(2) 262, remand was ordered because the complaint did not state a claim allowable exclusively under Federal law. The Court affirmed the right of the plaintiff to design his case so as to choose the

law under which his rights will be asserted. In American Well Works v. Layne, 241 U.S. 257, Mr. Justice Holmes, in an unanimous opinion, held that the averments of the complaint must be considered to find if the complaint states a cause of action under State law and if it did, then, on removal, the Federal Court had jurisdiction and it would be required to apply the State law.

In the case at bar, the first cause of action is stated in direct reliance upon Section 487 of the Judiciary Law. That Statute reads:

"Sec. 487. Misconduct by Attorneys

"An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party: * * * * Is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, forfeits to the party injured treble damages, to be recovered in a civil action."

Consequently, the first cause of action will support the recovery provided by this statute.

The second cause of action is an action attacking a prior judgment induced by the fraudulent conduct of the three defendants, and it states a valid cause of action under New York Law, see Chenu v. Board of Trustees, etc., 12 A.D.(2) 422, 212 N.Y.S.(2) 818, aff'd 11 N.Y.(2) 688, 225 N.Y.S.(2) 760, and cases cited. See also Verplanck v. Van Buren, 76 N.Y. 247 and CPLR 5015(3). The commentary to C.P.L.R. 5015, at

page 582 of Book 7-B of McKinney's Consol. Laws of New York, relating to R. 5015, confirms that New York courts have the inherent power to entertain a separate action attacking a judgment based upon fraud or mistake as in equity or where fraud has been perpetrated upon the court. Crouse v. McVicker, 207 N.Y. 213 is cited in support. See also Ladd v. Stevenson, 112 N.Y. 325. Although the case at bar is one for fraud against the parties who participated in the fraud, it is not addressed to the judgment obtained by the fraudulent conduct as would be the case if vacation of the judgment were requested.

It is respectfully submitted that the acts of these defendants, whether alone or in concert with Mr. Madden, did induce Judge Levet to act unlawfully, which deprived plaintiffs of due process. Such a decision is void as any other act denying due process is.

For cases placing the burden of proof on the government to show the non-deductibility of expenses, previously admitted by government auditors or by formal admissions within the litigation, see Lease v. U.S., 346 F.(2) 696; Routzahn v. Brown, 95 F.(2) 766, 775; Automobile Club of Mich. v. Comm'r., 230 F.(2) 585, 595 and Missouri Pacific R.R. Co. v. U.S., 338 F.(2) 668..

Section 487 of the Judiciary Law has been held to have a dual purpose; it is a misdemeanor to deceive the court

and it gives a party injured by that deception a right to recover treble damages; see Peo. v. Connolly, 3 A.D.(2) 943; 164 N.Y.S.(2) 66 and Fields v. Turner, 1 Misc.(2) 679; 147 N.Y.S.(2) 542.

Nor can there be any doubt that Section 487 is binding upon all lawyers admitted to the bar by a New York State court. Or, that its provisions extend to a United States attorney operating within the State of New York, or that the court deceived is a Federal Court. Patently, the Statute's purpose is to protect New York litigants in all courts located in New York State. This Statute does not interfere with any governmental function of the Federal Government, but rather protects it in the operations of its courts. A federal employee does not have a general immunity from the operation of state law; see 72 Am. Jur., 2nd, Statutes, Sec. 19. If a state statute does not violate the Constitution or any act of Congress, and it is a lawful exercise of its police power, no claim of immunity may be made derivatively from the sovereignty of the United States; see Penn Dairies, Inc. v. Milk Control Com., 318 U.S. 261, which spells out the principle very well. Although a state law was found to be violated in Ohio v. Thomas, 173 U.S. 276, and Johnson v. Maryland, 264 U.S. 478, but immunity was granted, the principle of the state's right to exercise its police power in absence of prohibition by the Constitution or an act

of Congress is clearly expressed therein. It is repeated in Graves v. N.Y. ex rel O'Keefe, 306 U.S. 466 and in Railway Mail Ass'n v. Corsi, 322 U.S. 88.

If anything, every nerve and fiber in our Constitution and in the acts of Congress is activated in the public good. The United States regulations of the Department of Justice requires that department, at sub-part Z-1, Section O.179, and Section O.179a to observe the enforcement of laws prohibiting Obstruction of Justice (18 U.S.C. 1501-1511); Perjury and Subornation of Perjury (18 U.S.C. 1621, 1622); False Declaration before a Grand Jury or Court (18 U.S.C., 1623). The principle that no government employee is above the law is basic to our Constitutional Government; U.S. v. Nixon, 418 U.S. 683, 715; Gravel v. U.S., 408 U.S. 606, 627, and Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388, and Marbury v. Madison, 1 Cranch 137, where Chief Judge Marshal wrote that our government is a government of laws and not of men. Perjury is a form of obstruction of justice; see U.S. v. Segal, 152 F. Supp. 370. The duties of the United States attorneys were described in Berger v. U.S., 295 U.S. 78, a case which has been cited frequently by public speakers at Law Day celebrations. In any event, there was no duty placed upon either defendant to gain a dismissal of the refund suit by the use of perjury and the other acts in obstructing the orderly procedures of the federal court

trying the case. When criminal conduct is resorted to by a government attorney in connection with a supposed duty to fulfill his job, and he causes damages, he will be held liable in a civil action; Lewis v. Brautigam, 227 F.(2) 124, 128. The liability of a public attorney for damage resulting from perjury or obstruction of justice induced by him is upheld and stated with citation to authorities in Hilliard v. Williams, 465 F.(2) 1212. In both cases, the court said, that while public attorneys, like judges of courts are accorded immunity from suits, their immunity applies only when acting in the ordinary course of his duties. If he conducts his duties in a criminal manner, he is not acting within the scope of his duties and he has no immunity. The Hilliard case refers to the Code of Professional Responsibilities with respect to public attorneys, viz., EC 7-13 which details the manner in which he should conduct himself. They clearly prohibit the use of criminal conduct in the performance of their duty. Also, in Brautigam, the Court said that a person taking part in a conspiracy to use illegal methods is equally as guilty as the one who actually executes the crime. Here then Levine, as well as Land and Reilly, are, in law, guilty of violating Section 487 and the state and federal crimes of perjury and of obstruction of justice, and the federal common ~~law giving the right to recover for such a fraud upon the~~ federal court.

Under federal common law, all parties to such a conspiracy are liable, in addition to Lewis v. Brautigam, Hilliard v. Williams and Bivens v. Six Unknown Fed. Narcotic Agents, supra; see Hazel-Atlas v. Hartford, 322 U.S. 238 and O'Shea v. Littleton, 414 U.S. 488. Criminal conduct of the official was strongly ostracized by the Supreme Court in the O'Shea case saying, "A judically fashioned privilege (will not be carried) so far as to immunize criminal conduct."

7 Moore's Fed. Prac., 2d Ed., at page 513, calls attention to the fact that the fraud practised upon the court was by an attorney for one of the parties and stated:

"We believe that this is important, for an attorney is an officer of the court. While he should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary, his loyalty to the court as an officer of the court thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case, he perpetrates a fraud upon the court."

For a discussion of the difference between the suit ending in a judgment that was fraudulently obtained and the suit brought to remedy the fraud is explained in Wright v. Miller, Federal Practice and Procedure, at Sections 2868 and 2870. Practically the whole of Section 2870 is devoted to a discussion of the court to re-hear a case where the judgment had been obtained by perjury conducted by attorneys. The foregoing cases including the Hazel-Atlas case forms the basis of that

discussion. The courts seemed to say that the judgments should not be allowed to stand.

a. Constitutional Question

In Bell v. Hood, 327 U.S. 678, the violation of the due process and equal protection of the laws provisions were held actionable even though the Constitution does not expressly say so. It is the inherent quality of the prohibition against violating those provisions of the Constitution to be redressed if violated. See also Bivens v. Six Unknown Fed. Narcotic Agents, 403 U.S. 388, where the cause of action for violation of the provisions of the Constitution was upheld. The Court was explicit, that the guarantees of the Constitution would mean nothing to the injured party if he could not sue to recover his damages. The fact that the wrongdoers were federal officers was held to be irrelevant to the maintenance of the action against them. It was enough if they had violated the Constitutional provisions. While the sovereign was thought to have immunity even in suits to redress the violation of Constitutional rights, the Court said, in Bivens, at p. 410 that the officials were not immune from such suits.

New York law, as stated in cases, have held that, where a public authority has by deceitful conduct or by the use of perjured evidence won his case, he has deprived the

losing party of his Constitutional rights. The theory is that the public attorney is a state official, and his action is state action and the deprivation of that right was a deprivation by action of a state. See Goldstein v. Lyons, 290 N.Y. 19; Morhouse v. The Supreme Court of the State of New York, 293 N.Y. 131; Peo. v. Savvides, 1 N.Y.(2) 554; Peo. v. Schwartzmann, 24 N.Y.(2) 241; c/f. American Railway Express Co. v. Kentucky, 173 U.S. 265, and Mooney v. Holohan, 294 U.S. 103.

Thus we see that violations of Constitutional rights are actionable even when the violator is a public official.

b. Res Judicata

In 46 Am. Jur., 2nd, Judgments, Sec. 394, the doctrine of res judicata is "that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated." At Section 404, the doctrine is further clarified by saying that the bar applies "to a subsequent action involving the same claim, demand, and cause of action."

In 50 Corpus Juris Secundum, Judgments, Section 598, res judicata is defined as "a judgment by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, on the same cause of action * * * " See Fowler v. National Screen Service, 349 U.S. 322

holding that res judicata does not apply where the second cause of action is bottomed upon a different set of facts than the cause of action in the first suit. See also So. Pac. Ry. v. U.S., 168 U.S. 1, 48; United Shoe Mach. Corp. v. U.S., 258 U.S. 451, 458, 459; and U.S. v. Moser, 266 U.S. 236, 241. How one can say that a tax refund suit is made up of the same facts as a suit to recover for damages because of criminal misconduct depriving a party of his cause of action for the tax refund suit is not explained. It can't be explained.

The Court below, failing to recognize that in this case, plaintiffs were suing for damages caused by acts of fraud and collusion upon the Court, stated that this suit is in reality a collateral attack on the judgment in the tax refund suit. This assessment is obviously wrong. Then it said that such relief is limited to applications within the tax refund suit under the permissive language of Rule 52(b), 59 and 60(b), F.R.C.P., and by appeal. It said further that plaintiffs brought proceedings to the reviews allowed by these rules, not only in the original refund trial, but in a post-trial motion to amend the complaint and re-open the proceeding and again on appeal. The Honorable Court below was very much mistaken about these facts. There was an appeal from the judgment, but there was no motion, nor other form of review brought by plaintiffs under any of the Rules of Federal Civil Procedure. The judgment on the tax refund suit does not adjudicate the issues in the complaint at bar. That judgment is strictly limited

to the deductibility or not of certain items that had been taken as deductible business expenses by plaintiff-husband in the operation of his business (p. 94). That judgment, only, was reviewed by this Court on appeal. No trial de nova was accorded on such appeal. If anything, the presumption of correctness limited a consideration of the truth of the operative facts. Expecially where an issue is raised that appears to rest upon conflicting testimony, this Court has said that it would be reluctant to set aside the trial court's findings, see M. Zack Metal Co. v. S/S Birmingham City, (2 C.A., 1962) 311 F.(2) 334. The affirmance, consequently, could not be said to have tested the truth of the combination of facts that went into the commission of the fraud and obstruction of justice that is found in plaintiff's papers on this motion.

Then the Honorable Court below found a distinction between fraud that was intrinsic and fraud that was extrinsic, saying that the fraud alleged here was intrinsic. Yet, Moore's Federal Practice, Vol. 1-B, par. 0.407 expressly states that in addition to the attack permissible under the Rules, an independent action may be brought if the judgment was rendered in violation of constitutional due process or extrinsic fraud, see p. 932. Moore's also discusses extrinsic-intrinsic fraud at par. 60.36 and 60.37, saying that these labels have no talismanic powers, but that the facts alleged by the aggrieved party control. Acts which affect the

decision-making power, whether perjury or by force, or the subtle action of fraudulently misleading the court into disregarding the facts or law of the case, would be in the class of extrinsic fraud warranting a collateral attack despite the judgment. See 46 Am. Jur., 2nd Judgments, Sections 825, 826. Wright v. Miller, Federal Practice and Procedure, in Section 2868 of their treatise advert to the abolishing of the distinction between extrinsic and intrinsic fraud of old, and say, at p. 240-241:

"The distinction rests on clouded and confused authorities, its soundness as a matter of policy is very doubtful, and it is extremely difficult to apply. It ought not to persist as a limit on independent actions now that it has been abolished for motions."

Rule 60(b) not only expressly exempts an action upon a fraudulent judgment from the limitation to the procedures set forth therein, but it affirms the common law rule that a suit for fraud upon a judgment may be maintained by the aggrieved party, separately from the judgment under attack.

Not only did the Honorable Court mistake the fraud alleged as intrinsic fraud, but it failed to understand that the complaint attacked the acts interfering with the decision-making process as criminal. The judgment so under attack cannot be res judicata. Not only because the two causes of action are different, but also because a judgment fraudulently obtained is a void judgment and void judgments are not capable

of establishing any rights by that adjudication. Hence, res judicata is not applicable and not given to such judgments. See Fay v. Noia, 372 U.S. 391, where the court said judgments violative of Constitutional privileges are open to attack at any time in the federal courts, even despite prior judgments.

In New York, res judicata is applied to a second action where there is a judgment that is a final judgment on the merits in an action between the parties and their privies, that would litigate the same cause of action; see Israel v. Wood Dolson Corp., 1 N.Y.(2) 116, 118; Schuykill Fuel Corp. v. Nieberg, 250 N.Y. 304, 306-07; Cook v. Conners, 215 N.Y. 175; Smith v. Kirkpatrick, 305 N.Y. 66; Weissman v. Friend, 29 A.D. (2) 599; and Plant City Steel Corp. v. National Machines Exchange, 23 N.Y.(2) 472, 477. These cases accord with the principles of res judicata and collateral estoppel as defined in 1-B, Moore's Federal Practice, par. 0.405. Hence, as the two causes of action are based on different sets of facts, they are not the same. Consequently, the rule of res judicata cannot apply here. Nevertheless, if the Federal rule of res judicata is not the same as New York's rule, the latter applies to this case.

Furthermore, in Jeter v. Hewitt, 22 How. 352, 364, 16 L. ed. 345, as in N.Y. State Labor Board v. Holland Laundry, 294 N.Y. 480, the effect of res judicata is referred to as

rendering white black and the straight crooked, for which reason courts must be slow to apply that doctrine. The repose of litigation does not mean the out-of-hand dismissal of a suit.

Also, Everett v. Everett, 180 N.Y. 452 and Perkins v. Guaranty Trust Co., 274 N.Y. 250, 267, as in Kinnear Weed Corp. v. Humble Oil Refining Co., 403 F.(2) 437, state that where the new action was confronted by a claim of res judicata by the judgment in the earlier action, and it was claimed by the plaintiff that that judgment was contrived by fraudulent conduct, res judicata cannot apply.

46 Am. Jur., 2nd, Judgments, Section 825 and 826 discuss the kind of acts which would support a claim of fraud upon a court as being those acts which operate upon the manner in which the judgment was procured, see n. 11 at p. 983. See also Chicago, R.I. & P.R. Co. v. Callicote, 267 Fed. Rep. 799, 16 ALR 386, cert. den., 255 U.S. 570, where the question was that feigning paralysis with the help of his physicians and family, the plaintiff induced the Court to award damages for such injuries when in truth such injuries were not a fact, was fraud. The Court of Appeals, Eighth Circuit, reviewed the record of the former trial, upon a trial within the second suit, and vacated the first judgment saying that such action was extrinsic fraud, warranting the vacation of the first judgment. The point is that case went to trial and the record facts were determined within the second suit, which was held

Moreover,
not barred by res judicata. /here plaintiffs claim that the record of the proceedings of the tax refund suit as submitted on the motion was incomplete. Consequently, the Court below had no power under the summary judgment statute to decide the questions of fact raised by plaintiffs, when they asserted that an exposition of the whole proceeding was necessary to a determination of whether the judgment or any interlocutory decisions were res judicata or could collaterally estopp this cause of action (69).

In Wright v. Miller, Federal Practice and Procedures, at Section 2870, the authors discuss the Hazel-Atlas Glass Company v. Hartford case which was presented to the Court below as support^{for} the right of litigants to maintain an action despite a former judgment where that judgment was procured by fraud. The authors also discuss Universal Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, which is to the same effect as the Hazel-Atlas case. The Supreme Court lashed out at attorneys who would pervert justice by fraud upon a court. Griffith v. Bank of New York (2 C.A., 1945), 147 F.(2) 899, 903, supports plaintiffs' action, although the Court below cited it for its decision. The decision held that the old extrinsic-intrinsic dichotomy of frauds no longer applied.

The late Chief Judge Clarke of this Court went to great lengths to investigate the proceedings in the prior litigation to show that res judicata did not apply. He could

not bring himself to the point of holding res judicata because ~~the~~ intermediate order had not been litigated as an issue of fact would be, upon the merits. New York says the same thing. In Bannon v. Bannon, 270 N.Y. 484, Chief Judge Lehman held that res judicata applies when the judgment in the prior suit is a final one on the merits, but that res judicata applies only to the issues decided. Chief Judge Lehman went on to explain that orders on motions that are subject to change are not final judgments and not on the merits and are not accorded res judicata effect.

If collateral estoppel is to apply there must be a trial and a final decision on the merits of the issues in question, and furthermore, the decision on such issue would have to be necessary to the final decision within the action. See Evergreens v. Nunan, 141 F.(2) 927, and Boling v. U.S., 231 F.(2) 926, 928. In the latter case the Court explicitly stated that a decision on a motion cannot be res judicata because it was not on the merits of the cause of action. The Honorable Court below, without assessing the nature of the proceedings in the prior suit, and whether issues were tried and finally determined, and were necessary, applied collateral estoppel anyway. A motion made in the prior suit to amend the complaint to include certain items of expense within the ambit of the Court's inquiry, does not bring up for review the fraudulent and collusive action of these defendants as asserted in the case at bar.

Furthermore, evidentiary facts are not subjected to the application of res judicata, see Freeman on Judgments, Section 690, at p. 1458, and Restatement of the Law--Judgments (1947), sec. 68(p.); as amended by 1948 Supplement, at 336-337. See also 1B, Moore's Federal Practice, par. 0.422[2]; and Norton v. Larney, 266 U.S. 511, 517.

1B, Moore's Federal Practice, par. 0.433[5], recites several instances where even though an issue has been raised and litigated in a prior suit the judgment the is not res judicata of the same issue in the latter suit cases cited by Moore's did not cover the situation of a suit for fraud upon the court, but the thought is that unnecessary findings to the question involved in the first suit, though thought to be necessary to that judgment, are not entitled to res judicata effect if it was not necessary and relevant to that judgment. The second court is obliged to investigate the facts. Here, in the case at bar, the issue of whether fraud was committed upon the Court was not wholly presented and not tried at all. There was some objections raised during the trial that were ignored and even this Court ignored appellants' attempts at objecting to such conduct. These collateral matters were not tried and they were not decided by a final judgment on the merits.

In fact, the learned Court below did not attempt to prove what issues were tried in the prior action. It seems

to have identified the plaintiffs' motive in bringing this suit as one to obtain what was lost in the tax refund suit, but it did not assess the dissimilarities of the two complaints and their issues. Furthermore, as this judgment was rendered upon a motion to dismiss, and for summary judgment, and as there was no proof offered as to how the fraudulent conduct here complained of was in issue and tried in that prior suit, the judgment appealed from lacks evidentiary support, and the claims of the plaintiffs at the very least raise triable issues. The record placed before the Court had no dispositions of the issues in this case, after trial, and the conclusion is inescapable that there is no fact support for the findings of the Court below. Plaintiffs, it is respectfully submitted, are entitled to correction of the judgment appealed from.

POINT II

THE DENIAL OF PLAINTIFFS' MOTION TO STRIKE THE APPEARANCE OF THE UNITED STATES ATTORNEY WAS ERRONEOUS.

In denying such motion the Court below cited no case in point for its denial, although, sua sponte, it cited three cases, none of which dealt with charges of criminal conduct that had been clearly proven. The Konigsberg case was the reverse of this. The plaintiff had failed to deny the affidavits of the officials that they had acted within the scope of their authority and so the Court had proof to grant summary judgment

for the officials. The King v. Hildbrand case involved the question of immunity accorded a petitioner in a lunacy proceeding, which clearly is immune. The U.S. v. Winscott case dealt with a charge of negligence against a clerk of the court. Obviously, then, these cases have nothing in common with plaintiffs' case. The defendants' actions were clearly criminal actions, and they were not denied as facts by the defendants. Plaintiffs argued that the facts showed that a crime had been committed, as prohibited by 18 U.S.C. 1501, 1503, 1621 and 1917; and as prohibited in New York's Penal Law, Sections 100.05, 100.10, 105.05, 195.00, 195.5. 210.00 and 210.15. Also, Section 487 of New York's Judiciary Law was violated. The Honorable Court below said that defendants could not be considered criminals unless a court had found them guilty of the acts charged. If there had been some dispute about the facts there might have been reason for the Court's thinking, but, where the facts are not denied, and in large measure they cannot be denied, for their conduct are matters of record, the Court below erred in not consenting to be bound by the facts before it.

There is nothing in the Common Law, the United States Statutes, or in the Regulations, permitting the United States Attorneys to defend one against charges of criminal conduct. The Code, 28 U.S.C. 506, et seq., and the Regulations, in respect of the conduct of the offices of Attorney General and his assistants, 28 C.F.R., Sec. 0.5 and 0.55 affirmatively,

enjoin upon the official duties to protect and defend the interest of the United States. Title 28 U.S.C., Sec. 547(1) commands the Attorney General to prosecute all offenses against the United States. Aren't the actions of the defendants an offense against the United States? Doesn't it then follow that the command of the positive duty to prosecute negates any authority to defend one accused of the criminal conduct here complained of? Does the fact that these defendants were working for the United States at the time of their conduct put them above prosecution for this crime? Evidently not, for the Supreme Court has emphatically said that no man in this country is above the law, see U.S. v. Nixon, 418 U.S. 683, 715 and Gravel v. U.S., 408 U.S. 606, 627. In fact, the Supreme Court set standards for Government's attorneys for performing their duties in Berger v. U.S., supra, which has become classical. Above reproach, not above the law, is the gist of that command.

It is not amiss to recall U.S. v. Siegel, supra, where Judge Bryan said that perjury may amount to an obstruction of justice, just as was said in the Hazel-Atlas case, supra. Nor are Government officials immune from suit for damages when they act in an unlawful manner outside the scope of their duties; see Lewis v. Brauligam, supra; Bivens v. Six Unknown Federal Agents, 7 Moore's Federal Practice, 2d, at p. 514; and Hilliard v. Williams, supra. Judge Wisdom, in U.S. v. McLeod, 385 F.(2) 734, 745, 746, said that judges may not pursue unlawful conduct.

See also Ex-Parte Virginia, 100 U.S. 339. The law of New York differs from federal law in respect of immunity; see the dissenting opinions of Judge Burke, in Rottkamp v. Young, 15 N.Y.(2) 831, 833, and of Judge Scileppi in Lombard v. Stokes, 18 N.Y.(2) 394, 402. A judge is not immune from suit if he proceeds outside his jurisdiction; see Lange v. Benedict, 73 N.Y. 12, Jamieson v. State, 4 Misc.(2) 326, 158 N.Y.S.(2) 496, aff'd, 7 A.D.(2) 944, 182 N.Y.S.(2) 41; Murray v. Brancato, 290 N.Y. 52, and Koepp v. City of Hudson, 276 App. Div. 443, 95 N.Y.S.(2) 700, 703.

Besides, this suit is against the defendants individually. It does not concern the pecuniary interest of the United States. The Federal Courts have found it necessary to strike the appearance of the Attorney General when he failed to show, as was the case here, that his ^{avowed} intention in this suit was not in the public interest, or that the Government had a pecuniary interest in the outcome, see Calhoun County, Florida v. Roberts, 137 F.(2) 130; United States v. San Jacinto, 125 U.S. 273; Allen v. County School, 28 F.R.D. 358 and International Products Corp. v. Koons, 325 F.(2) 403

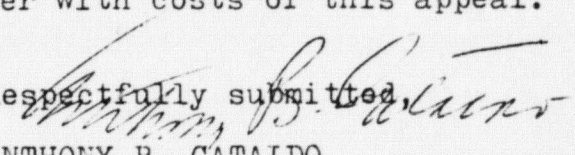
The Government attached a letter from an Irving Jaffe, Acting Assistant Attorney General, allegedly authorizing Mr. Trager to appear for defendants, but they offered no proof of authority or lawful reason for such action (p. 32). It is respectfully submitted that if a law-enforcing officer steps

into private litigation to protect one who is guilty of criminal conduct, he is frustrating his duties, and is an incongruity which ought not to escape the notice of this Honorable Court.

CONCLUSION

It is respectfully submitted that the order appealed from be reversed, that plaintiff have partial summary judgment for the violation of Section 487, Judiciary Law of New York, as against Land and Reilly, and that the balance of the case, viz., the conspiracy count against all three, be severed and tried according to law, together with costs of this appeal.

Respectfully submitted,


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Three copies of motion brief were
served on November 1, 1977

Attorney for respondents

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